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In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 535 F. 2d 87. The Board's decision and order (Pet. App. 14a-36a) are reported at 216 NLRB 45.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a-11a) was entered on March 31, 1976, and the Board's timely petitions for rehearing and rehear-

ing *en banc* were denied on June 25, 1976 (Pet. App. 12a–13a). On September 13, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 22, 1976. The petition was filed on that date and was granted on February 22, 1977 (App. 69).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a pre-hire agreement between an employer and a union, entered into pursuant to Section 8(f) of the National Labor Relations Act, privileges recognitional picketing by a minority union which would otherwise violate Section 8(b)(7)(C) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8. [29 U.S.C. 158] * * * (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such

[1] "App." refers to the Appendix to the brief herein.

> labor organization is currently certified as the representative of such employees:
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: * * *
>
> * * * * *
>
> (f) It shall not be an unfair labor practice under subsection (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the be-

ginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

* * * * *

Sec. 9. [29 U.S.C. 159] (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

In May 1973, Higdon Construction Company executed a contract with Glenmore Distilleries Company to erect a facility in Owensboro, Kentucky. The con-

tract with Glenmore required the contractor to "use union labor exclusively in the performance of this contract" (Pet. App. 29a). Accordingly, Higdon Construction sought to employ ironworkers for the job through respondent Union's[2] hiring hall. The Union refused to furnish employees unless Higdon Construction accepted an area-wide labor agreement which the Union had entered into with a multi-employer association.[3] Higdon Construction attempted at first to use non-union labor. However, after the Union and other labor organizations struck the Glenmore jobsite, Higdon Construction signed an acceptance of the Union's area-wide agreement on July 31, 1973. The agreement professed to cover all employees within the Union's geographic jurisdiction who performed iron work for signatory companies, and was to expire by its terms on March 31, 1976. The agreement contained no provision requiring employees hired by the employer to become union members within a specified period of time (commonly known as a "union security clause") and no provision requiring the employer to withhold Union dues from employee wages. (Pet. App. 3a–4a, 15a, 29a–31a; App. 28–29, 45.)

Higdon Construction complied fully with the agreement with respect to employees hired for the Glenmore job (Pet. App. 15a). However, in July 1973, Gerald Higdon, the sole owner of Higdon Construction, formed Higdon Contracting Company

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[2] Local 103 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.

[3] The agreement is set out at App. 48–68.

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for the purpose of performing non-union ironwork jobs. Thereafter Higdon Contracting successfully bid on non-union jobs for W. R. Grace Company and Barmet Industries. After work on those jobs began in early 1974, the Union demanded that the prior agreement be applied to those jobs as well. Gerald Higdon refused, explaining that the very purpose of establishing Higdon Contracting was to have a company that could perform non-union work and thus be able to compete with other contractors for non-union jobs (Pet. App. 16a). In response, the Union picketed the jobs with signs stating (Pet. App. 17a):

> Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103.

Picketing at the Grace jobsite began on January 29, 1974, and continued until March 1, 1974. The Union picketed the Barmet jobsite for five days in March 1974. (Pet. App. 15a–17a, 28a, 30a–31a; App. 30–32, 39.)

Neither on July 31, 1973, nor at any time thereafter did the Union have, or claim to have, the support of a majority of the employees of Higdon Construction or Higdon Contracting within an appropriate bargaining unit. At the time of the picketing of the Grace and Barmet jobsites the Union was not the certified representative of the Higdon Contracting or Higdon Construction employees. During the relevant periods, neither the Union, Higdon Construction, nor Higdon Contracting filed a petition for an election under Section 9 of the Act, 29 U.S.C. 159. (Pet. App. 15a, 17a, 31a; App. 29–30.)

Upon a charge filed by Higdon Contracting,[4] the Board found that the Union violated Section 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(7)(C), by picketing for recognition at the Grace jobsite for a period of more than 30 days when it did not represent a majority of Higdon's employees and when a petition for a representation election had not been filed.

The Board found that the agreement between the Union and Higdon was a valid "pre-hire agreement" sanctioned by Section 8(f) of the Act, 29 U.S.C. 158(f) (Pet. App. 31a). The Board also found that Higdon Contracting was the *alter ego* of Higdon Construction, that both companies constituted a single integrated entity under the Act, and that accordingly the Union's pre-hire agreement with Hig-

[4] The General Counsel of the Board refused to issue a complaint on the Union's charge that Higdon had violated Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5) (Pet. App. 17a). He also dismissed a charge filed by Higdon alleging that the Union's picketing violated Section 8(b)(4) of the Act, 29 U.S.C. 158(b)(4), the secondary boycott provision, on the ground that "the only purpose of the picketing was to require the Employer to honor its contract with [the Union]" (App. 43).

Pending a Board determination of the complaint which did issue on Higdon's Section 8(b)(7)(C) charge, the Board's General Counsel sought an injunction from the District Court for the Western District of Kentucky under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), seeking to enjoin the Union's picketing. Without deciding the merits of the General Counsel's Section 8(b)(7) claim, the district court denied injunctive relief on the grounds that, in view of the cessation of the picketing, there was not a sufficient likelihood of irreparable harm to warrant injunctive relief (App. 37–38). By stipulation of the parties, the transcript of the district court hearing was deemed to be part of the administrative record, and portions of the transcript are set forth at App. 11–38.

don Construction applied to both companies (Pet. App. 20a, n. 7). However, the Board rejected the Union's contention that its picketing of the Grace jobsite was privileged as a means of enforcing that agreement (Pet. App. 14a–21a). On the basis of its decision in *R. J. Smith Construction Co.*,[5] the Board held that, "although Section 8(f) of the Act clearly exempts a company and union from unfair labor practice liability for entering into a contract prior to establishment of the union as a majority representative, [it] does not protect the union from inquiry into its majority status during the contract term" (Pet. App. 17a–18a). Accordingly, the Board held that, "where a union never thereafter obtains majority status, the company does not violate Section 8(a)(5) and (d) of the Act by refusing to continue the bargaining relationship established and by unilaterally changing terms and conditions of employment set forth in the contract" (Pet. App. 18a). The Board concluded (*id.* at 20a):

> For the Board to allow the [Union] to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein has done with respect to nonunion jobs, which [the Union] could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could

[5] 191 NLRB 693, reversed *sub nom. Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A.D.C.), decision on remand, 208 NLRB 615. See also *Ruttmann Construction Co.*, 191 NLRB 701.

> not do directly, and in effect nullify our decision in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status.

The Board ordered the Union to cease its unlawful recognitional picketing (Pet. App. 22a–23a).

The court of appeals denied enforcement of the Board's order. Adhering to the view of Section 8(f) which it had previously expressed in reversing the Board's decision in *R. J. Smith*,[6] the court stated (Pet. App. 8a–9a; footnote omitted):

> [U]nions which are parties to pre-hire agreements have the right to complain of unfair labor practices, including alleged refusals by the employer to bargain collectively, before the union achieves a majority. Conversely, an employer who has entered into a validly executed Section 8(f) pre-hire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union. The Company here could have taken that step but did not. It was the Company, Higdon, which committed an unfair labor practice when, of its own motion, it refused to bargain collectively with the Union.

SUMMARY OF ARGUMENT

1. It is a fundamental principle of the National Labor Relations Act that employees shall be free to select their own bargaining representative and can-

[6] *Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A.D.C.).

not be bound by the terms of an agreement entered into by a labor organization that they have not freely selected as their own representative. Section 8(b)(7)(C) provides significant protection for those rights by prohibiting picketing by an uncertified union for the purpose of forcing the employer to recognize the union as the bargaining representative of his employees, for more than thirty days, unless a petition for an election has been filed within that period.

The Union's picketing here came squarely within the ban of Section 8(b)(7)(C). It is undisputed that the Union has never been certified as the representative of Higdon's employees. Nevertheless, the Union picketed Higdon for more than 30 days, during which time no representation election petition was filed. The purpose of the picketing was to compel Higdon to adhere to the pre-hire agreement executed in July 1973 and thus, in effect, to recognize the Union as the bargaining representative of Higdon's employees at the Grace jobsite.

2. Section 8(f) of the Act does not, either in language or purpose, privilege picketing by a minority union that would otherwise violate Section 8(b)(7)(C). Because of special characteristics of the construction industry, Congress provided in Section 8(f) that it shall not be an unfair labor practice for unions and employers in the construction industry to enter into collective bargaining agreements—commonly known as "pre-hire agreements"—before the majority status of the union has been established. Nothing in Section 8(f), however, suggests that such a pre-hire

agreement relieves the union of the obligation, until the agreement expires, to acquire the support of the majority of the employees later hired. Nor does Section 8(f) provide or suggest that pre-hire agreements permit signatory unions to impose, by prolonged picketing in violation of Section 8(b)(7)(C), contract terms upon employees who have never assented to them through representatives of their own choosing. Indeed, the legislative history of Section 8(f) demonstrates that Congress did not intend it to confer the kind of automatic representative status that the court of appeals' decision would create.

3. The Board's decisions in this and related cases properly accommodate the basic objectives of the Act, reflected in Section 8(b)(7)(C), with the specific objectives of Section 8(f). Those decisions serve the principal purpose of the Act by ensuring that minority unions may not coercively impose upon employers and their employees contract terms that the employees have not agreed to through their own chosen representatives, and by requiring construction unions to satisfy the same obligation to acquire and demonstrate majority support that the Act imposes on other unions. At the same time, the Board's decisions serve the objectives of Section 8(f) by permitting even minority unions a reasonable time—thirty days—to picket to enforce a pre-hire agreement while the union seeks majority support, by requiring an employer to honor pre-hire agreements and bargain with the union if the union in fact is supported

by a majority of the employees, and by permitting the union to picket more than thirty days if it files a petition for an election. While the Board's rulings do not accord pre-hire agreements the same degree of conclusive effect that the court of appeals would, they do ensure that such agreements will be sufficiently enforceable to satisfy Congress' purpose in sanctioning them without sacrificing Congress' basic commitment to the principle of employee free choice.

4. The Board's decision is consistent with decisions of this Court, which have recognized that the Act, to protect the basic principles of Section 7, places the primary burden upon unions to achieve and demonstrate majority support and not upon employers to demonstrate that the union does not have majority support. The court of appeals' decision has reversed that burden by permitting minority unions coercively to enforce recognition as the bargaining representative until an employer has initiated the election process and that process has been completed.

ARGUMENT

A PRE-HIRE AGREEMENT BETWEEN AN EMPLOYER AND A UNION, ENTERED INTO PURSUANT TO SECTION 8(f) OF THE ACT, DOES NOT PRIVILEGE RECOGNITIONAL PICKETING BY A MINORITY UNION WHICH WOULD OTHERWISE VIOLATE SECTION 8(b)(7)(C) OF THE ACT

A. THE UNION'S PICKETING CAME WITHIN THE PROSCRIPTION OF SECTION 8(b)(7)(C)

A fundamental tenet of the National Labor Relations Act, reflected in many of its provisions, is that employees shall have the right "to bargain collectively

through representatives of their own choosing." Section 7, 29 U.S.C. 157. Thus Section 9(a), 29 U.S.C. 159(a), provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit" for those purposes. Section 8(a)(5), 29 U.S.C. 158(a)(5), in turn, makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Similarly, as this Court has held, it is a violation of Section 8(a)(1) and (2) of the Act, 29 U.S.C. 158(a)(1) and (2), for an employer, and a violation of Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), for a union, to enter into a bargaining agreement when the union does not represent a majority of the unit employees. *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731.

Section 8(b)(7), 29 U.S.C. 158(b)(7), enacted in 1959, provides a significant additional protection for the right of employees to choose their own bargaining representative. Section 8(b)(7)(C) makes it an unfair labor practice for a union that has not been certified by the Board as the employees' bargaining representative to engage in recognitional picketing[7] for more than a reasonable period of time, not to ex-

[7] That is, picketing for the purpose of "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees." Section 8(b)(7).

ceed 30 days, unless a representation petition is filed with the Board within that time. If a timely petition is filed, Section 8(b)(7)(C) provides for an expedited election, thereby channeling the underlying question of representation into the election procedures of Section 9 of the Act and insuring that the representation question will be promptly resolved by the free choice of a majority of the employees concerned rather than by the ability of the employer and the employees to withstand the adverse economic impact of the picketing.[8] See *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 326 F. 2d 634, 636–638 (C.A.D.C.); *Department & Specialty Store Employees' Local 1265* v. *Brown*, 284 F. 2d 619, 625–627 (C.A. 9), certiorari denied, 366 U.S. 934; *International Hod Carriers, Local 840 (Blinne Construction Company)*, 135 NLRB 1153, 1156–1158. As this Court stated in *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 632:

> One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing * * *. Construction unions are fully covered by [this section].

[8] If a timely petition is filed, the picketing may continue until the election is held and the results are certified. If the union loses the election, continued recognitional picketing would violate Section 8(b)(7)(B), which bars recognitional picketing within 12 months of a valid election. On the other hand, if the union wins the election and is certified, continued picketing would be lawful under the express exception for picketing by a "currently certified" labor organization.

The Union's picketing here came squarely within the ban of Section 8(b)(7)(C). The Union has never been certified by the Board as the representative of Higdon's employees. Nor has it ever been selected by a majority of those employees as their representative. Nevertheless, the Union picketed Higdon for more than 30 days, during which time no representation petition was filed. The avowed purpose of the picketing was to compel Higdon to adhere to the prehire agreement executed in July 1973 and thus, in effect, to recognize the Union as the bargaining representative of Higdon's employees at the Grace jobsite. Moreover, the picketing in this case was for precisely the objective that Section 8(b)(7) was enacted to prevent—the coercive imposition on employees of a bargaining representative whom they have never selected.

Respondent Union, however, asserts that its picketing was not "recognitional picketing" within the meaning of Section 8(b)(7)(C)—that is, not for the purpose of "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees"—but was merely to enforce the terms of its pre-hire agreement (Br. in Opp. 3–4). Respondent contends that "[t]he law is clear that, as the courts and the Board have all ruled, picketing by a union to secure compliance with an existing contract is not barred by Section 8(b)(7)(C)" (*id.* at 4). Although that contention does not

precisely state the law, it does not in any event support respondent's position.

As a general matter the Board and the courts have broadly applied Section 8(b)(7) to restrain recognitional picketing by uncertified unions, even when the union may in fact represent a majority of the employees and even when the picketing is in part for the purpose of protesting unfair labor practices by the employer, including the employer's alleged unlawful refusal to bargain with the union in violation of Section 8(a)(5). *Dayton Typographical Union No. 57* v. *National Labor Relations Board, supra*; *International Hod Carriers, Local 840* (*Blinne Construction Company*), *supra*.[9]

However, several decisions by the Board have recognized a limited qualification to the literal scope of Section 8(b)(7) in cases where an un-

[9] Both the Board in *International Hod Carriers, supra*, and the court in *Dayton Typographical Union, supra*, agreed that most employer unfair labor practices, including the union's claim that the employer had unlawfully refused to bargain with it in violation of Section 8(a)(5), would not constitute a defense to an 8(b)(7) charge against a union. However, the Board has indicated that, when a union actually files an 8(a)(5) charge that is subsequently found meritorious, picketing in support of a complaint based on that charge does not violate Section 8(b)(7). This qualification to the reach of Section 8(b)(7) is based on the fact that a meritorious 8(a)(5) charge presupposes that there is no issue of representation which an election would resolve. Accordingly, the Board has consistently rejected election petitions when an 8(a)(5) complaint has been issued, including petitons filed in the course of recognitional picketing. See *International Hod Carriers, supra*, 135 NLRB at 1166, n. 24. The court in *Dayton Typographical Union* did not directly address the Board's position on this matter since an 8(a)(5) charge was not filed there, and it is not relevant here since the Union's 8(a)(5) charge against Higdon was dismissed. See note 4, *supra*.

certified union representing a majority of the employees in an appropriate unit has been accorded recognition by the employer. Thus, where an employer has voluntarily recognized such a union and has entered into a labor agreement with it, the Board has held that picketing to enforce that agreement, or succeeding agreements, does not violate Section 8(b)(7) although the picketing in fact constitutes an attempt by the union to force the employer to bargain with it. *Building and Construction Trades Council of Santa Barbara County* (*Sullivan Electric Company*), 146 NLRB 1086. See, also, *Bay Counties District Council of Carpenters* (*Disney Roofing and Material Company*), 154 NLRB 1598, 1605, enforced on other grounds, 382 F. 2d 593 (C.A. 9), certiorari denied, 389 U.S. 1037. Since the primary purpose of Section 8(b)(7) was to restrain picketing designed to coerce employer recognition of the union as the bargaining representative, the Board has correctly concluded that that section was not intended to apply to situations in which the employer has already recognized the union as the Section 9(a), or majority, representative of its employees. 146 NLRB at 1087.[10]

[10] It is, of course, well settled that the refusal of an employer to comply with the terms of an agreement entered into with a majority representative constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) that may be remedied by a bargaining order. See *National Labor Relations Board* v. *Hyde's Supermarket*, 339 F. 2d 568, 571–573 (C.A. 9). Moreover, such a contract carries with it a presumption that the union's initial majority status has continued. *Eastern Washington Distributing Co., Inc.*, 216 NLRB 1149, 1153; *Dayton Motels, Inc.*, 192 NLRB 674, 678, enforced, 474 F. 2d 328, 525 F. 2d 476 (C.A. 6). Cf. *Hexton Furniture Co.*, 111 NLRB 342, 344.

That qualification, which is based not upon the existence of a contract but upon the employer's previous recognition of the union as the representative of a majority of its employees, does not apply to the respondent Union here. The employer, Higdon, never recognized the Union as the Section 9(a) representative of its employees. And, neither at the time the contract was entered into nor at the time of its attempted application at the Grace jobsite, did the Union represent a majority of Higdon's employees. In these circumstances, picketing to force Higdon to adhere to the terms of a labor agreement clearly constituted picketing for the purpose of "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees" in violation of Section 8(b)(7)(C)."

At most, the Union's claim that its picketing was not recognitional but was instead picketing to enforce an agreement merely restates the issue in the case—whether Section 8(f) itself establishes that a union

" Contrary to the Union's contention (Br. in Opp. 2), there is no inconsistency between this conclusion and the fact that the General Counsel dismissed Higdon's 8(b)(4)" charge against the Union (note 4, *supra*) for the reason that "the only purpose of the picketing was to require the Employer to honor its contract with [the Union]." The General Counsel was indicating that the evidence did not disclose a secondary boycott objective; he had no occasion to pass on the question, presented by Higdon's pending 8(b)(7)(C) charge, whether the contract sought to be enforced afforded a defense to picketing which would otherwise violate Section 8(b)(7)(C).

signatory to a pre-hire agreement shall be deemed by operation of law to be the recognized bargaining representative of all employees subsequently hired until the agreement expires or the union is ousted by an employer-initiated Board election. As we demonstrate below, neither the language of Section 8(f) nor its legislative history supports that conclusion, or in any way suggests that Congress intended so sweeping a qualification of the Act's major premise that employees shall be represented by bargaining agents of their own choosing.

B. THE UNION'S PRE-HIRE AGREEMENT DID NOT REMOVE ITS PICKETING FROM THE PROHIBITIONS OF SECTION 8(b)(7)(C)

1. Section 8(f) of the Act provides no exception to Section 8(b)(7)(C)'s prohibition of recognitional picketing by an uncertified union for more than thirty days. Section 8(f) merely declares that it shall not be an unfair labor practice for employers and unions in the construction industry "to make an agreement covering employees engaged (or who, upon their employment, will be engaged)" in that industry before the majority status of the union has been established.

Congress enacted Section 8(f) in 1959 as a limited exception for employers and unions in the construction industry from the general rule under the Act that collective bargaining agreements can be concluded only after the union has been selected by the majority of

the employees is an appropriate unit.[12] The exception was enacted in recognition of special characteristics of the construction industry—primarily the short-term nature of most construction projects—which often made it impractical for employers and unions to conclude meaningful agreements and thus deprived employers of the assurances they needed concerning their source of labor and their anticipated labor costs before bidding for or commencing projects. As the Senate Committee on Labor and Welfare explained the purposes of Section 8(f):

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The

[12] As noted (*supra*, p. 13), ordinarily an employer would violate Section 8(a)(1) and (2) of the Act, and the union Section 8(b)(1)(A), by entering into a bargaining agreement before the union has acquired the support of a majority of the unit employees. Indeed, in *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, *supra*, the Court held that an agreement between an employer and a minority union constituted unfair labor practices even though both the union and the employer believed in good faith that the union had majority support.

Moreover, whether the union has a majority is ordinarily to be determined only after a representative employee complement has been hired. See *The Lukas-Harold Corp.*, 44 NLRB 730; *Solar Aircraft Company*, 48 NLRB 242; cf. *Sardik Food Products Corp.*, 46 NLRB 894, 896.

> practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. [S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 86th Cong., 1st Sess. 424 (G.P.O. 1959), hereafter "Leg. Hist. (1959)".][13]

[13] Under the Wagner Act, the Board generally did not assert jurisdiction over the construction industry, considering the operations of most construction contractors not to be involved in commerce. See *Brown and Root, Inc.*, 51 NLRB 820. After enactment of the Taft-Hartley Act, in 1947, the Board assumed jurisdiction over the construction industry and the incompatibility between the Board's representation principles and procedures and the characteristics of that industry became pronounced. The difficulty of holding representation elections in that industry was explained as follows by General Counsel Bott, at a Senate hearing, in 1951,

Section 8(f) attempted to meet this problem by permitting an employer and a union in the construction industry to enter into a pre-hire agreement without committing an unfair labor practice.

Nothing in the language of Section 8(f), however, suggests that it was designed to confer upon a union that is a party to a pre-hire agreement the kind of representative status that would support a Section 8(a)(5) bargaining order against an employer who refused to bargain with it, or that would exempt the union from the restrictions on recognitional picketing in Section 8(b)(7). Indeed, the language and structure of the Act suggest precisely the opposite.

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on a bill which, like Section 8(f), would, *inter alia*, have authorized pre-hire agreements in the construction industry:

"The complement of employees changes from job to job. The complement consists of a pool of craftsmen or workmen from which all the contractors in the trade draw for their labor. The workmen, both skilled and unskilled, are constantly moving from job to job. No single employer can be identified as their employer in the conventional sense.They may work for a dozen different contractors in a single year.

"An appropriate unit of employees ordinarily implies a definite employer employing identifiable employees. If the unit were to be defined on the particular construction project the contractor's work on the project might be completed by the time an election could be held. Conducting elections throughout the industry on this basis might disenfranchise craftsmen not actually employed on the voting eligibility dates fixed by the Board or at the time of the actual election." (Hearings on S. 1973 before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess. 190 (1951).)

See also S. Rep. No. 1509, 82d Cong., 2d Sess. 3–6 (1952).

Significantly, Congress in 1959 did not, in Section 8(f) or elsewhere, modify Section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a)*" (emphasis supplied). Section 9(a) provides that the exclusive bargaining representative shall be a representative selected "by the *majority* of the employees in a unit appropriate for such purposes * * *" (emphasis supplied). Accordingly, the Board in this case correctly concluded that concluded that (Pet. App. 20a):

> [T]o allow the [Union] to picket to enforce an 8(f) agreement * * * which [the Union] could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could not do directly * * *.

Furthermore, while the Board's well-established contract bar rules prevent the Board from entertaining an election petition during the term of an ordinary contract with a Section 9(a) majority representative,[14] pre-hire agreements do not have a similar effect, since Section 8(f) expressly provides that a pre-hire agreement "shall not be a bar" to the filing of a petition for a representation election under Section 9(c).[15] In short, the language of Section 8(f) and its relationship to other provisions of the Act reflect that Section 8(f) was not intended to relieve unions that

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[14] See *Hexton Furniture Co.*, 111 NLRB 342, 344; *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000.

[15] The proviso also provides for the filing of a petition for an election under Section 9(e), 29 U.S.C. 159(e), to deauthorize the union security provision of the contract (if there is one).

are parties to pre-hire agreements from the obligation to achieve majority support before they can require an employer to honor such an agreement by means of Section 8(a)(5), or to accord such unions the kind of recognition as the bargaining representative that would exempt them from the recognitional picketing prohibitions of Section 8(b)(7).

The legislative history of Section 8(f) confirms that Congress did not intend its authorization of pre-hire agreements in the construction industry to confer automatic representative status on the union or to obviate the union's obligation to acquire majority support. Congress rejected a proposal that would have permitted the Board to certify a union signing a pre-hire agreement as the employees' representative without an election or other proof of majority support merely upon a showing of a history of bargaining between the union and the employer.[16] Instead, as

[16] The Landrum-Griffin bill contained a provision permitting such certification. See Sec. 702 of H.R. 8400, 86th Cong., 1st Sess., I Leg. Hist. (1959) 678–679. See also 105 Cong. Rec. 6431, II Leg. Hist. (1959) 1082 (Senator Goldwater); 105 Cong. Rec. 15541–15542, II Leg. Hist. (1959) 1578 (analysis by Representatives Thompson and Udall). The certification would have cloaked the union with representation and bargaining rights for at least one year. See *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. In conference, the Landrum-Griffin provision was rejected in favor of the present Section 8(f) (contained in the Senate bill) which permitted employers and unions in the construction industry to enter into pre-hire agreements even where there had been no bargaining history, but left the union vulnerable to unseating if it did not thereafter acquire majority support. See 105 Cong. Rec. 17899, II Leg. Hist. (1959) 1432 (Senator Kennedy); 105 Cong. Rec. 18135, II Leg. Hist. (1959) 1922 (Representative Udall).

noted, Congress provided that the representative status of the union could be challenged at any time. As this Court stated in *Connell, supra,* 421 U.S. at 632:

> The only special consideration given [construction unions] in organizational campaigns is §8(f), which allows "pre-hire" agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation. * * *

2. The court of appeals erred in concluding that the Board's position violates the purpose of Section 8(f) by making pre-hire agreements "virtually unenforceable." *Local 150, Operating Engineers* v. *National Labor Relations Board,* 480 F. 2d 1186, 1190 (C.A.D.C.). The Board's decisions in this and other Section 8(f) cases are consistent with the language and intent of Section 8(f), and properly accommodate the purposes of that section with the basic principles of the Act, reflect in Section 8(b)(7).

The Board's decisions under Section 8(f) reveal a consistent rationale. For example, in *R. J. Smith Company, supra,* the Board held that an employer did not violate Section 8(a)(5) when it failed to honor the terms of a pre-hire agreement entered into with a union that concededly did not represent the majority of the employer's employees. Although the case presented no picketing issue, the Board concluded that Section 8(f) was intended "to immunize from liability only the preliminary contractual steps which precede an employer's acquisition of a work force * * *." 191 NLRB at 694. The Board reasoned that, since Section 8(f) expressly permits an

election petition to test the majority status of a union with a pre-hire contract, it would be anomalous to conclude that an employer could not test that status in the context of litigating a Section 8(a)(5) charge (*ibid.*)."[17] The Board's decision made clear, however, that if such a union, either in an election or in unfair labor practice litigation, demonstrates its majority status, the employer will have violated Section 8(a)(5) by refusing to recognize it and honor the agreement. The Board also indicated that, in certain circumstances, a Section 8(f) agreement might create a presumption of majority status, which it would be incumbent on the employer to rebut. "This might occur, for example, when a union-security agreement is present in the 8(f) contract and has been enforced. That is not the case here." 191 NLRB at 695, n. 5.[18] The Board applied those principles in *National Labor Relations Board* v. *Irvin-McKelvy*, 475 F. 2d 1265 (C.A. 3), enforcing in relevant part 194 NLRB 52, when it found that an employer violated Section 8(a)(5) when it refused to honor a pre-hire agreement that contained a union-security clause that was enforced and that therefore resulted in a majority of

[17] See also *Ruttmann Construction Co.*, 191 NLRB 701, where the Board declined to find an 8(a)(5) violation by an employer who repudiated a pre-hire agreement with a minority union by signing and enforcing another pre-hire agreement with another union.

[18] As noted, the court of appeals reversed the Board's decision in *Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 (C.A.D.C.).

the employees' being union members."[19] In the instant case, the Board applied the foregoing principles to a Section 8(b)(7)(C) context, and held that, since the employer was not required to honor the pre-hire agreement with respect to projects where the Union did not have the support of a majority of the employees, the Union was not permitted to force compliance by picketing in violation of Section 8(b)(7).

In summary, these principles may be distilled from the Board decisions above: Where a union with a pre-hire agreement does not in fact represent a majority of the employees, the employer is not required to comply with the agreement and the union is not permitted to force such compliance by prolonged recognitional picketing. If the union does in fact represent a majority, the employer is required to honor the agreement and the union does not violate Section 8(b)(7) by picketing to force compliance. Whether the union represents a majority is a fact that may be litigated in an unfair labor practice proceeding under Section 8(a)(5) or 8(b)(7), and majority status will be presumed (subject to rebuttal by the employer) where there is an operative union security clause in the pre-hire agreement. Furthermore, even when a union in fact lacks majority support, picketing by the union for more than thirty days will not violate Section 8(b)(7)(C) if it files a petition for an election within that period.

[19] The court of appeals affirmed that finding, and expressly reserved the question of "how we would rule if presented with the repudiation during its term by a § 8(f) employer of a collective bargaining agreement containing no union security provisions * * *." 475 F. 2d at 1271.

While the foregoing principles do not give conclusive effect to pre-hire agreements, they by no means render pre-hire agreements "an exercise in futility" or "virtually unenforceable";[20] rather, they provide reasonable assurance that such agreements will have the effect and serve the purposes which Congress intended in sanctioning them. Employers and unions in the construction industry are able to enter into pre-hire agreements that will provide the employer with the needed certainty in determining his costs and with a ready supply of skilled labor. Where, as Congress assumed would generally be the case, the union does represent a majority of the employees later hired, the union can enforce adherence to the pre-hire contract, through unfair labor practice proceedings or picketing, just as a union signatory to a standard collective agreement could do. Thus, even when the employer entertains doubt as to the union's majority support among his employees, his repudiation of a pre-hire agreement would run considerable risk—apart from the ill-will it would be likely to generate[21]—of exposing him to Section 8(a)(5) liability

[20] *Local 150, supra*, 480 F. 2d at 1190.

[21] In most cases, of course, as Congress assumed, employers in the construction industry will not unilaterally abrogate pre-hire agreements. There are natural disincentives to prevent businessmen, who must deal on a continuing basis with labor organizations, from freely repudiating their agreements, even though such agreements may not be enforceable in court. The instant case is an example: Higdon complied fully with the pre-hire agreement on the project in connection with which he signed it. He simply declined to apply it to subsequent projects where a majority of the employees were non-union.

(and a consequent bargaining order and other affirmative relief), since the union might subsequently demonstrate that it in fact had majority support.[22] Finally, even if the union does not acquire the support of a majority of the employees hired immediately after the commencement of a project, Section 8(b)(7)(C) provides the union with a reasonable period of time (up to thirty days) to picket to enforce the agreement while it attempts to obtain majority support.

The court of appeals' decision, on the other hand, would significantly abridge the Act's basic principle that employees shall be represented for collective bargaining purposes only by representatives whom a majority of the employees have freely selected. It would mean that a minority union could compel an employer to comply with a pre-hire agreement, whether through a Section 8(a)(5) bargaining order or unlimited picketing, for the entire term of the agreement or until the Board completes an election initiated by the employer's petition. Under the court's

[22] If the pre-hire agreement contains a union-security clause, the employer's risk is enhanced, since he will be required to overcome the presumption of the union's majority support flowing from the existence of such clause. Moreover, that the employer may have entertained good faith doubts as to the union's majority status would not be a defense to an 8(a)(5) charge if the union in fact had acquired majority support. Just as an employer's erroneous good faith belief in the union's majority status is not a defense to a charge that the employer violated Section 8(a)(1) and (2) by concluding an agreement with a minority union. See *International Ladies' Garment Workers' Union* v. *National Labor Relations Board, supra.*

view an employer would be bound by a pre-hire agreement not only in cases where his employees desire no union but also even in cases where most of his employees are members of another union. In short, the court's decision would significantly lessen the incentives of a union with a pre-hire agreement to acquire the support of a majority of the employees subsequently hired and would pose the very danger of "top-down" organizing that Section 8(b)(7) was designed to prevent—namely, that the support such a union may eventually acquire is the result not of the employees' free choice but of the coercion inherent in protracted picketing.

Notwithstanding those consequences, the court of appeals concluded (Pet. App. 9a) [23] that the final proviso of Section 8(f), which permits unions, employers, or groups of employees to petition for an election during the term of a pre-hire agreement, was intended to constitute the employer's exclusive means of obtaining release from a pre-hire contract or of restraining protracted picketing by a minority union. That conclusion is erroneous. The language of the final proviso is plainly permissive. It states that a pre-hire agreement "shall not be a bar" to an election petition under Section 9 (c) or (e), but does not require such a petition. If an employer has doubts about a union's majority support, he may protect himself from possible liability under Section 8(a)(5) by filing a petition.

[23] See, also, *Local 150*, *supra*, 480 F. 2d at 1189–1191.

But to hold that he must file a petition, or else abide by a pre-hire agreement or suffer prolonged picketing by a minority union, is in effect to accord the union the very presumption of representative status that Congress specifically declined to confer in enacting Section 8(f).

Similarly, there is no basis for the court's view that the Board's decisions under Section 8(f) render pre-hire agreements "virtually unenforceable." As we have shown (pp. 25–29, *supra*), the Board's decisions accord considerable significance and "enforceability" to pre-hire agreements. But, in any event, the Board's position does not make pre-hire agreements more "unenforceable" than the decision of the court of appeals. Under the court's decision a pre-hire agreement becomes unenforceable after a Board election, initiated by the employer's petition, determines that the union lacks majority support. The significant difference between the court's position and the Board's relates to *when* the agreement becomes unenforceable and who has the burden of triggering the determining event. The Board's position, unlike the court's, is consistent with the basic principles of the Act, which impose an affirmative obligation on unions to achieve and demonstrate majority support.

3. This Court, in analogous circumstances, has recently reaffirmed the principles which also support the Board's decisions under Section 8(f). In *Linden Lumber Division* v. *National Labor Relations Board*,

419 U.S. 301, the Court held that an employer, even when confronted with union authorization cards signed by a majority of its employees, is not required by the Act to petition for an election before it may decline to bargain with the union. There, as in this case, the court of appeals had concluded that Congress, by permitting employers to petition for elections under Section 9, intended to make the filing of a petition the only means of contesting the union's majority status. This Court rejected that view, holding that the Act places the burden on the union to establish its majority.[24] As the Court observed, "[l]arge issues ride on who takes the initiative." 419 U.S. at 308. That observation is particularly pertinent here, where the union does not even claim to represent a majority of the employees. To require employers in those circumstances to abide by a pre-hire agreement until they petition for an election to formalize the union's lack of majority support is contrary to the Act's fundamental principle that employees shall have the right "to bargain collectively through representa-

[24] Similarly, even where the employer has entered into a conventional bargaining agreement with a union which is a Section 9(a) representative, at the end of the contract period the employer is not limited to filing a petition under Section 9(c) to attempt to unseat the union. It may simply withdraw recognition if it has reasonable grounds for believing that the union has lost its majority, and proof of such grounds would constitute a defense to any complaint alleging a refusal to bargain in violation of Section 8(a)(5). See *Lodges 1746 and 743, International Association of Machinists* v. *National Labor Relations Board (United Aircraft Corp.)*, 416 F. 2d 809 (C.A.D.C.), certiorari denied, 396 U.S. 1058; *Celanese Corp. of America*, 95 NLRB 664, 671–673.

tives of their own choosing" (Section 7, 29 U.S.C. 157), and to this Court's admonition that the 1959 amendments to the Act were designed to limit "top-down" organizing practices. *Connell, supra,* 421 U.S. at 632.[25]

Furthermore, *Linden Lumber* undercuts the conclusion of the court of appeals here that permitting an employer to decline to bargain with a union with a pre-hire agreement until the union demonstrates its majority status in an election initiated by the union would encourage "flagrant unfair labor practices"[26] by the employer designed to discourage union membership. In view of the sanctions of Section 8(a)(1) (and the injunctive remedies available to the Board under Section 10(j), 29 U.S.C. 160(j)), the basis

[25] Indeed, in one respect, the Board's rules under Section 8(f) accord greater effect to pre-hire agreements than the principles of *Linden Lumber* would require. Under *Linden Lumber*, an employer who rejects a claim for recognition and bargaining by a union that presents evidence of majority support does not violate Section 8(a)(5) even if it is subsequently shown that the union in fact had majority support—at least so long as the employer does not commit other unfair labor practices that would undermine the election process (*National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575). The employer may simply insist that the union seek an election. As noted, *supra*, under Section 8(f), however, an employer who does not comply with a pre-hire agreement will be found to have violated Section 8(a)(5) if it is subsequently shown that the union in fact had majority support. The higher standard in the 8(f) context serves to assure that employers will not freely ignore pre-hire agreements, and thus effectuates the purpose of Section 8(f) without sacrificing the basic principle of employee freedom of choice.

[26] *Local 150, supra*, 480 F. 2d at 1190.

for the court of appeals' concern is not clear.[27] In any event, the potential for abuse is no different from that in the *Linden Lumber* context, where the Court nevertheless placed the burden of seeking an election squarely on the union. Moreover, here, as in *Linden Lumber,* there was no evidence of unfair labor practices by the employer.

Finally, the Board's decision in this and related cases represents a reasonable resolution of various policies of the Act that the Board has evolved over a number of years on the basis of its familiarity with the statute and with the practical problems of the industry. In *Linden Lumber* this Court confirmed the special role of the Board with respect to questions of this kind, saying (419 U.S. at 309–310):

> The Board has at least some expertise in these matters and its judgment is that an employer's petition for an election, though permissible, is not the required course. * * *
>
> In light of the statutory scheme and the practical administrative procedural questions involved, we cannot say that the Board's decision * * * was arbitrary and capricious or an abuse of discretion.

We submit that those considerations apply fully here and that the Board's decision "fall[s] well within that category of situations in which the courts should defer to the agency's understanding of the statute which

[27] Indeed, the court of appeals' position poses a far more significant danger—namely, that unions will be able to coerce employee support through such tactics as protracted picketing.

it administers." *National Labor Relations Board* v. *Enterprise Assn.*, No. 75–777, decided February 22, 1977, slip op. 20.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to enforce the Board's order.

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